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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

WANDA BIRDSALL, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACK BIRDSALL, DECEASED	CAUSE NO. : CV-08-48-BU-SEH-RKS
	Hon. ___________________________
Plaintiff,	**COMPLAINT**
-vs-	
UNITED STATES OF AMERICA,	
Defendant.	

Plaintiff Wanda Birdsall, Individually and as Personal Representative of the Estate of Jack Birdsall, Deceased (Birdsall) makes the following allegations against the Defendant:

NATURE OF THE ACTION

1. This is a wrongful death and survival claim against the U.S. Postal Service ("USPS") for the negligent maintenance of its premises ("the Post Office"), located at 209 Grizzly Ave., West Yellowstone, Gallatin County, Montana, United States of America.

PARTIES

2. Plaintiff Wanda Birdsall is the widow of Jack Birdsall, deceased. Mr. and Mrs. Birdsall were residents of West Yellowstone, Gallatin County, Montana at the time of the incident made the basis of this claim. Mrs. Birdsall now resides in Andrews, Texas.

3. Defendant, United States Postal Service, is a federal governmental agency subject to the Federal Tort Claims Act.

JURISDICTION

4. This Court has jurisdiction over this matter because it is brought pursuant to and in compliance with 28 U.S.C. §§1346(b), 2671-2680 et seq., commonly known as the "Federal Tort Claims Act," which vests exclusive subject matter jurisdiction of Federal Tort Claims litigation in the Federal District Court.

5. The amount in controversy exceeds $75,000.00.

VENUE

6. This Court has venue over this matter pursuant to 28 U.S.C. § 1402(b) and the Local Rules of Procedure of the United States District Court for the District of Montana, specifically L.R. 1.11(a)(1).

LIABILITY OF THE UNITED STATES OF AMERICA

7. This case is commenced and prosecuted against the United States of America pursuant to and in compliance with Title 28 U.S.C. §§2671-2680, commonly referred to as the "Federal Tort Claims Act." Liability of the United States is predicated specifically on Title 28 U.S.C. §§ 1346(b)(1) and 2674 because the damages caused to Plaintiff were proximately caused by the negligence, wrongful acts and/or omissions of employees of the United States of America while they were acting within the scope of their office or employment, under circumstances where the United States of America, if a private person, would be liable to the Plaintiff in the same manner and to the same extent as a private individual under the laws of the State of Montana.

JURISDICTIONAL PREREQUISITES

8. Wanda Birdsall brings this action against the United States Postal Service (hereafter "USPS") under 28 U.S.C. § 1346(b).

9. Plaintiff pleads pursuant to Title 28 U.S.C. §§ 2672 and 2675(a), that the claims set forth herein were filed with and presented administratively to an agency of the United States of America, the United States Postal Service, on October 29, 2007.

10. Attached to this Complaint as Exhibit "A," and incorporated by reference, is a true and correct copy of Plaintiff's Notice of Claim, excluding attachments.

11. On November 7, 2007, the Tort Claims Examiner/Adjudicator for the United States Postal Service acknowledged receipt of Plaintiff's Claim, a true and correct copy of which is attached as Exhibit "B," and incorporated by reference.

12. The Defendant investigated Plaintiff's claim.

13. On June 4, 2008, the United States Postal Service denied Plaintiff's claim by correspondence dated June 4, 2008, a true and correct copy of which is attached as Exhibit "C," and incorporated by reference.

14. Accordingly, Plaintiff has timely presented this claim in writing to the USPS, and has complied with all jurisdictional prerequisites to commencement and prosecution of this litigation by filing this Complaint within six months of the denial of her claim.

CONDITIONS PRECEDENT

15. All other conditions precedent have been performed or have occurred.

THE U.S. POSTAL SERVICE IS AN AGENCY OF THE UNITED STATES

16. The U.S. Postal Service is an agency of the United States of America.

EMPLOYMENT, AGENCY AND COURSE AND SCOPE

17. At all times material to this Complaint, all persons working for the U.S. Postal Service in connection with all claims set forth in this Complaint were agents, servants, and/or employees of the U.S. Postal Service, the United States of America, or some other agency thereof, and were at all times material hereto, acting within the course and scope of such employment.

18. Whenever in this Complaint it is alleged that Defendant did some act or thing, it is meant that its officers, agents, servants, employees, and/or representatives did such act or thing, and at the time such act or thing was done, it was done with Defendant’s full authorization or ratification, or it was done in the normal and routine course and scope of employment of Defendant’s officers, agents, servants, employees and/or representatives.

FACTS

19. On December 27, 2006, Jack Birdsall, stepped out of his truck in the West Yellowstone Post Office (Post Office) parking lot, slipped on the icy surface and struck the running board of his truck with his head, causing him to suffer an intracranial bleed and subdural hematoma, which led to his death.

20. Jack Birdsall, was a patron of the Post Office and was lawfully on its premises at the time of his injuries.

21. Upon information and belief, over the years there had been many complaints made to this Post Office, its agents, employees, and representatives concerning the hazardous accumulation of ice in its common area parking lot and sidewalks, and the West Yellowstone Post Office employees, agents and supervisors had to have known of prior falls there.

22. The dangerous and icy conditions were a recurring problem at the Post Office, which had been relocated to its Grizzly Avenue address several years before Jack's fall. The old post office did not have the same icy conditions because parking was in the street, and the City of West Yellowstone took care of snow and ice removal.

23. The Grizzly Avenue location had its own, enclosed parking lot, and patrons were not forced to park on the street. As a result, Post Office patrons routinely left their vehicles running while they went inside the building, so that the hot exhaust from the running vehicles would melt the ice enough so that when the ice re-froze, it became dangerously slick and imperceptible.

24. The very evening of Jack Birdsall's fall—and prior to it—another patron complained that he had slipped at the same entryway in the parking lot that Jack Birdsall used to reach his post office box.

25. Although warned of the hazard, and having received actual notice of the dangerous condition, the Post Office did nothing to either warn its patrons of the hazard and defect, or make its premises safer.

26. The Post Office knew of the hazards associated with snow and ice in its parking lot, yet failed to inspect and maintain its property, leading to Jack Birdsall's death, and the damages made the basis of these claims.

27. There were no alternative routes free of ice or snow because there is no daily mail delivery in West Yellowstone, and the patrons must enter the premises in order to get their mail.

28. There was no other reasonable alternative for Jack Birdsall, a patron of the Post Office, to retrieve his mail, except to drive his vehicle to the post office, park as close as he could to the entrance, exit his vehicle on the Post Office premises, and traverse the parking lot to the entrance.

29. The Post Office failed to exhibit the degree of ordinary care which reasonable persons would use under the same or similar circumstances, and this breach of care was the proximate cause of Jack Birdsall's injuries and death.

30. The Post Office would be expected to inspect and maintain these common areas and routes of ingress and egress to the building itself.

31. Jack Birdsall was wearing the proper footwear for the weather conditions, which consisted of rugged, treaded, snow boots at the time of his injury.

32. The weather at the Post Office was not inclement at the time of the fall, as it did not begin to snow until after Mr. Birdsall fell.

33. At the time of his fall and subsequent death, Jack Birdsall was in fairly good health.

34. An Air Force veteran, Mr. Birdsall worked around the house and for a prominent business family in town, and enjoyed riding horses and recreating.

35. Jack Birdsall's life expectancy at the time of his death was approximately 12.8 years.

36. Jack Birdsall's death was directly and proximately related to his fall on ice at the Post Office.

37. As a result of his fall, the intracranial bleed and subdural hematoma, Jack Birsdsall experienced conscious pain and suffering.

38. Mr. and Mrs. Birdsall had been married 48 years, and were just one month shy of celebrating their 49th wedding anniversary when Jack Birdsall died.

39. At the time of Jack Birdsall's fall and subsequent death, Wanda Birdsall had a life expectancy of approximately 19.7 years.

40. The Post Office has a duty to maintain its premises, including its parking area and sidewalks, in a reasonably safe condition for ordinary and public use, to take measures to prevent its patrons from falling on the ice, and to warn people of any hidden or lurking dangers.

41. The Post Office owed a duty to ensure its patrons were not injured as the result of dangerous and defective conditions on its premises.

42. The Post Office knew of the dangerous condition of its parking area and sidewalks generally, which alone was sufficient to make Jack Birdsall's fall foreseeable.

43. In general, the Post Office knew that patrons would often leave their vehicles running, causing the exhaust to hit the snow and ice and melt it so that it became harder to see and dangerously-slick.

44. In addition to its general knowledge of the danger of its premises, the Post Office also had specific knowledge that, prior to Jack Birdsall's injury, another patron slipped on the ice and nearly fell — and reported the dangerous condition to the Post Office agent and employee at West Yellowstone.

45. After receiving direct and immediate knowledge of this incident, and the dangerous condition of its premises, the Post Office could no longer ignore the dangerous condition of its premises. Yet the Post Office did not act.

46. Policy considerations support the imposition of duty upon the Post Office. Its premises are open to the public; its patrons are "captive," meaning that the majority of postal customers must visit the post office to retrieve their mail because there is ordinarily no direct postal delivery in West Yellowstone.

47. Society has a legitimate interest in the prevention of harm to all Post Office users because the Post Office should be safe for all persons. The Post Office had a minimal burden to either remedy or warn of the situation. They could have put down salt, sand, cat litter, or the like, and they could have warned of the danger by the minimal use

of cones or a sign, the feasibility of which is shown by the Post Office's actions in sanding the lot—only after Jack Birdsall's fall and injury, and while he lay in a coma.

48. The Post Office breached its duty of ordinary care when it failed to take any remedial action generally in response to the overall dangerous condition of its premises, and in its specific lack of response to the known danger following the report by the patron who had previously slipped in the parking lot.

49. The Post Office had notice of the dangerous and defective condition of its premises, had ample opportunity to act, and neither cured or removed the defective and dangerous condition, nor did it give warning of the same.

FIRST CLAIM FOR RELIEF
(Survival and Wrongful Death Action – Plaintiff against U.S.)

50. Plaintiff realleges paragraphs 1 through 49, above.

51. Plaintiff asserts a wrongful death and survival action under Mont. Code Ann. §§ 27-1-501, 27-1-513, and 28 U.S.C. § 1346(b).

52. As Personal Representative of the Estate of Jack Birdsall, and under Mont. Code Ann. § 27-2-501, Wanda Birdsall asserts a survival action on behalf of the Estate of Jack Birdsall.

53. In this regard, Mr. Birdsall survived an appreciable period of time following his painful injuries.

54. Further, the estate, through its Personal Representative, Wanda Birdsall, seeks medical costs, funeral expenses, and damages for the physical and mental pain and suffering, mental anguish and emotional distress Jack Birdsall endured.

55. Wanda and Jack Birdsall raised four children together, suffering together the death of one child when she was merely 18 years-old. Wanda was a stay-at-home mother who did not hold a job, and who relied on her husband for everything outside the home. For Wanda Birdsall, individually, the loss of her husband at this stage in her life has caused her extreme grief, bereavement and anguish.

56. They had an “old-fashioned” marriage, where she would cook and clean and take care of Jack, and Jack would pay the bills, do the chores, cut the grass, and drive her wherever she needed, or wanted to go. Wanda was forced to take on all of these extra responsibilities when Jack died, which was very scary for her, and increased her anxiety and anguish for losing Jack.

57. Wanda Birdsall also asserts a wrongful death and loss of consortium action under Mont. Code Ann. § § 27- 2-513 and 27-2-323, on her own behalf as surviving spouse of Jack Birdsall, Deceased, and seeks damages for her grief, sorrow, mental and emotional anguish, and loss of comfort and society as the result of the death of her husband of nearly 49 years.

SECOND CLAIM FOR RELIEF
(Negligence -- Plaintiff against U.S.)

58. Plaintiff realleges paragraphs 1 through 57, above.

59. The Post Office owed a duty to Plaintiff to maintain its premises in a reasonably safe condition and to warn of any hidden or lurking dangers.

60. Generally, the Post Office was aware of a recurring dangerous condition in its parking lot that was routinely left unaddressed, thereby creating constructive notice of a dangerous condition.

61. Specifically, the Post Office had actual or constructive notice of a dangerous condition in its parking lot and failed to address, warn or otherwise take remediative steps to protect its patrons, specifically including Jack Birdsall, deceased.

62. The Post Office failed to inspect the common area of its parking lot and should be charged with constructive notice of the dangerous condition that a reasonable inspection would have discovered.

63. The Post Office failed to act on specific, timely, knowledge of a complaint of a dangerous condition in its parking lot.

64. Defendant's agents, employees and representatives failed to do that which a reasonable person under the same or similar circumstances would have done, namely, to inspect the parking lot and place sand, salt or ice-melt, on the ice, or, if not feasible, at least warn its patrons of the dangerous situation.

65. Conversely, Defendant's agents, employees and representatives did something that a reasonable person would not have done in like circumstances, namely, nothing.

66. These failures amount to breaches of the Post Office's duty to its patron, Jack Birdsall, deceased.

67. Jack Birdsall's injuries and death were proximately caused by Defendant's breaches.

68. Plaintiff is entitled to recover damages from Defendant in an amount to be determined at trial.

REQUEST FOR RELIEF

69. As a direct and proximate result of Defendant's negligence, Jack Birdsall was severely physically injured and incurred medical expenses, and, ultimately, burial and funeral expenses, and suffered physical pain and mental anguish. Plaintiff Wanda Birdsall has suffered a loss of comfort, financial support and companionship, as well as emotional distress as a result of the injuries and death of her husband.

70. Wanda Birdsall seeks wrongful death damages, including reasonable compensation for Jack Birdsall's death. Among other damages, Montana allows the trier of fact to consider any financial support Wanda Birdsall would have received, or would have had a right to receive from Jack Birdsall except for his death.

71. In this regard, Mrs. Birdsall seeks the reasonable monetary value, past and future, of the deceased's non-compensated services, whether paid or not, which the deceased would normally have performed for her, as well as any financial support and benefits, past and future, Wanda would have received, or would have had the right to receive, from Jack Birdsall, but for his death.

72. Wanda Birdsall also seeks past and future compensation for the value of the society, comfort, guidance, education, care, protection, and companionship which she has lost by reason of Jack's death, and past and future damages for her grief, sorrow, and mental anguish resulting from her husband's death.

73. As personal representative of Jack Birdsall's estate, Wanda Birdsall seeks reasonable compensation for those damages suffered by her husband as the result of the injuries he incurred before he died – the conscious physical and mental pain and suffering Jack Birdsall suffered in the interval between the injury and death.

74. Jack Birdsall's estate should also be awarded funeral and crematory expenses, and all reasonable medical charges which were incurred in connection with Jack Birdsall's fall at the Post Office and his ultimate death.

75. Because the medical bills incurred on Jack Birdsall's behalf were paid for by Medicare, notice of Medicare's *superlien* is hereby provided in this regard.

PRAYER

For these reasons, Plaintiff asks for judgment against Defendant for the following:

a. Actual damages, both general and special;

b. Costs of suit;

c. Prejudgment and postjudgment interest; and

d. All other relief, at law and in equity, the Court deems appropriate.

DATED: August 18, 2008.

Respectfully submitted,

By: /s/ Russell S. Waddell

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